No. 84-942

In the Supreme Court of the United States

October Term, 1984

RECEIVED
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OFFICE OF THE CLERK,
SUPREME COURT, U.S.

State of Mississippi

Petitioner

v.

Attina Cannaday,

Respondent

Motion for Leave to Proceed In Forma Pauperis

Respondent, Attina Cannaday, by her counsel, moves this Court for leave to proceed in forma pauperis pursuant to Rule 46 of this Court. Respondent states as follows:

1. She was convicted of capital murder and sentenced to death on September 23, 1982, in the Circuit Court for Harrison County, Mississippi. On direct appeal the Supreme Court of Mississippi affirmed her conviction, but vacated her sentence of death and remanded to the trial court for further proceedings. The State now seeks review of the decision to vacate the death sentence pursuant to a petition for a writ of certiorari.

2. She was represented by appointed counsel at her trial and on direct appeal. She is represented by voluteer counsel in this Court.

3. She has been incarcerated since her arrest. She is presently incarcerated at the Mississippi State Penitentiary, Parchman, Mississippi.

4 She is indigent as evidenced by a copy of her affidavit of indigency, attached hereto, and the original of which has been filed in this Court in action No. 84-5900.

WHEREFORE, for the foregoing reasons and for such other easons as may appear to this Court, Respondent prays that her motion be granted.

Respectfully submitted,

Robert E. Morin

Robert E. Morin
414 Hungerford Drive
Suite 250
(301)424-4990
Counsel for Respondent

CASE NO. ~

IN THE

SUPREME COURT OF THE UNITED STATES

ATTINA CANNADAY,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITIONER'S

MOTION TO PROCEED IN FORMA PAUPERIS

I, Attina Cannaday, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes_____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer._____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received._____

_____

2. Ha you received within the t twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months._____

_____

3. Do you own any cash or checking or savings account? Yes____ No X

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No. X

a. If the answer is yes, describe the property and state its approximate value._____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons._____

_____

I understand that a false statement or answer to any question in this Affidavit will subject me to the penalties for perjury.

Attina Cannaday
ATTINA CANNADAY

SUBSCRIBED AND SWORN TO before me this 6 day of Dec. 19 84

Subscribed and sworn to before me in my presence, this 6 day of Dec. a Notary Public in and [illegible]

My Commission Expires [illegible]

No. 84-942

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MISSISSIPPI,

Petitioner,

V.

ATTINA MARIE CANNADY,

Respondent

Response to Petition for Writ of Certiorari

Robert E. Morin, Esquire
414 Hungerford Drive, Suite 250
Rockville, Maryland 20850
(301) 424-4990

Counsel for Respondent

Question Presented

1. May this Court properly grant a writ of certiorari in this case where the Mississippi Supreme Court stated that it based its opinion on independent and adequate state law grounds?

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Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1974).....2

Wolf v. Weinstein, 372 U.S. 633 (1963).....3

Other Authorities

Mississippi Const.Art. 3, Section 26, which provides in part:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . .and he shall not be compelled to give evidence against himself;.....3

Miss.Ann.Code Section 99-15-15 (1972).....3

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OPINION BELOW

The opinion of the Mississippi Supreme Court is reported at Cannaday v. State, 455 S.2d 713 (Miss. 1984), and set forth in the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3). However, since the lower court relied upon independent and adequate state law grounds, it has failed to do so.

STATEMENT OF CASE

Respondent has filed a petition for certiorari arising out of the case below. That petition is numbered 84-5900. She will rely upon and incorporate by reference the statement of facts as set forth in that petition.

REASON FOR NOT GRANTING WRIT

1. This Court Should Not Grant the Writ Because the Court Below Based its Decision on Independent and Adequate State Law Grounds

For over a century, this Court has adhered to the principle that it will not review a decision by a state court that is based upon independent and adequate state grounds. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). In Murdock, this Court determined that even if a federal question was contained in a particular case, review would not be granted if the case was exclusively decided on adequate state grounds. Seventy years later, in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945), this Court expanded upon the operation of this principle:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that relied upon on adequate and independent state grounds. [citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our constitution. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion and if the same judgment will be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than advisory opinion.

Id. at 125-126.

Even if a particular decision of a state court rests upon both federal and non-federal grounds, this Court will not take

jurisdiction of a case "if the non-federal ground is independent of the federal ground and adequate to support the judgment" Fox Film Corporation v. Muller, 296 U.S. 207, 210 (1935). Recent decisions indicate the continuing vitality of the "independent and adequate state ground" doctrine. City of Revere v. Massachusetts General Hospital, ___U.S. ___, 103 S.Ct. 2979 (1983); Florida v. Casal, ___U.S. ___, 103 S.Ct. 3100 (1983)(per curiam). Furthermore, the independent state law basis for a decision often does not become apparent until briefs have been filed and arguments presented. Wolf v. Weinstein, 372 U.S. 633 (1963).

To be sure, recent decisions have indicated that a statement asserting state law grounds by the state court must be "clear and express." Michigan v. Long, 77 L.Ed.2d 1201, 1215 (1983). However, in this case, the declaration by that state court indicating that its decision was based on state law grounds could not have been made more clear.

In deciding this case on direct appeal, the Mississippi Supreme Court stated as follows with respect to the issue which petitioner asks that this Court review:

> Mississippi jurisprudence has the same constitutional and statutory provisions and rules guaranteeing these same rights. Mississippi Constitution Art. 3, Section 26 provides that "(I)n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, . . .and he shall not be compelled to give evidence against himself;. . ." Also, see Mississippi code Annotated section 99-15-15 (1972) and Mississippi Criminal Rules of Procedure, Rule 1.03. 1.05.
>
> Since the Mississippi jurisprudence provides an adequate and equal basis for these constitutional rights, we base our opinion herein on Mississippi law, notwithstanding the fact that reference is made to federal cases. The federal cases are used for the purpose of guidance, but Mississippi jurisprudence compels the result. Michigan v. Long, ___U.S. ___, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Cannaday v. State, 455 S.2d 713, 722 (Miss. 1983); A42-43 (emphasis added). Thus, the Mississippi Supreme Court expressly decided the question on the basis of state, and not federal constitutional, law.

Moreover, the fact that the Mississippi State law may provide for greater protections under its State Constitution, than those provided by the federal Constitution, does not present a basis of review for this Court. This Court has often recognized the ability of a State to construe its own constitution to provide more protection than the federal counterpart. Oregon v. Hass, 420 U.S. 714 (1975); Illinois v. Gates, ____U.S.____, 103 S.Ct. 2317, 76 L.Ed.2d 527, 556-557 (1983)(White, J. Concurring); Mills v. Rogers, 457 U.S. 291 (1982); Cooper v. California, 386 U.S. 58 (1967).

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari to the Mississippi Supreme Court should be denied.

Respectfully submitted,

Robert E. Morin, Esquire
Counsel for Respondent
414 Hungerford Drive, Suite 250
Rockville, Maryland 20850
(301) 424-4990

No. 84-942

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MISSISSIPPI	*
Petitioner,	*
V.	*
ATTINA MARIE CANNADAY	*
Respondent.	*

AFFIDAVIT OF SERVICE

I, ROBERT E. MORIN, being duly sworn, depose and say as follows:

1. I am a member of the Bar of this Court.

2. I am counsel for Attina Cannaday, respondent in the above-captioned case.

3. On the 11th day of January, 1985, I mailed copies of the attached Response to Petition for Writ of Certiorari to the Supreme Court of Mississippi, Motion for Leave to Proceed in Forma Pauperis, and Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis, first class mail, postage pre-paid, to Edwin Lloyd Pittman, Attorney General of the State of Mississippi, Post Office Box 220, Jackson, Mississippi, 39205.

Robert E. Morin
Attorney for the Defendant
414 Hungerford Drive, Suite 250
Rockville, Maryland 20850
(301) 424-4990

Subscribed and sworn to me this 11th day of January, 1985.

Rebecca H Rice
Notary Public

My commission expires: July 1, 1986